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May 2, 2017

BY FOIAonline PORTAL

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

**Subj: Freedom of Information Act Request Regarding
Reconsideration of the Clean Water Rule.**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552, and the U.S. Environmental Protection Agency's (EPA) FOIA regulations, 40 C.F.R. §§ 2.100 to 2.108 (2016), we request on behalf of the Massachusetts Attorney General's Office the records described below and a fee waiver for any costs associated with this request.

In particular, we request all records, as that term has been defined by the Act and interpreted by the courts (*e.g.*, 5 U.S.C. § 552(f)(2)), that reference, discuss, and/or concern in any respect EPA's actual or potential use of non-federal government persons or entities, in any capacity and by any means, in any part of its reconsideration, rescission, or rewrite of the Clean Water Rule, which was published as a Final Rule in 2015, *see* 80 Fed. Reg. 37,054 (June 29, 2015). Please provide these records on a rolling basis and in a readily-accessible, electronic ".pdf" format. *See* 5 U.S.C. § 552(a)(3)(B). If EPA has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, then please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location), (ii) the justification for the destruction or claimed exemption(s), and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A).

We respectfully request a waiver of search and duplication fees associated with this request because the disclosure of the requested records satisfies FOIA's public interest requirement and the commercial interest test is inapplicable. In other words, EPA's disclosure of the requested records "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(l)(1). Because the Massachusetts Attorney General's Office is a governmental, and not a commercial entity, the commercial interest test and its two factors are inapplicable, *id.* at § 2.107(l)(3), and, as an additional consequence, EPA may not charge for review fees, *see id.* at § 2.101(c)(2)(iii). Thus, the following discussion focuses on the public interest requirement and its four factors, *see id.* at § 2.07(l)(2)(i)-(iv), all of which are satisfied here.

First, the subject of the requested records "concerns 'the operations or activities of government.'" 40 C.F.R. § 2.107(l)(2)(i). Here, the requested records concern a quintessential governmental activity—the EPA Administrator's authority to reconsider and rescind existing EPA regulations like the Clean Water Rule and his authority to promulgate new regulations pursuant to the Clean Water Act and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706. On April 18, 2016, a story published by *Politico* reported that representatives of one or more industry groups are trying to persuade EPA to hire private lawyers to lead the new administration's effort to rewrite the Clean Water Rule.¹ Outsourcing any part of the EPA Administrator's Clean Water Act rulemaking authority clearly "concerns 'the operations or activities of the government,'" and the connection between that actual or potential action and EPA's rulemaking activities is "direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Second, the requested records are "likely to contribute' to an understanding of government operations or activities" because they will clarify EPA's position on an issue of significant public importance and provide the agency's views on both the questions of if and how such an arrangement could be structured and the benefits and drawbacks of facilitating such an arrangement. 40 C.F.R. § 2.107(l)(2)(ii). In addition, any third-party correspondence covered by the request will provide valuable insight into the options that EPA may be considering and the legal bases for those options. By doing so, the public will be positioned to better understand the proposals and their implications for any effort to rescind and/or rewrite the Clean Water Rule and the public's ability to participate meaningfully in such processes. In both instances, the requested records will "be meaningfully informative" to the public about the government operations and activities in question, i.e., the EPA Administrator's authority to, *inter alia*, hire outside parties to rewrite the Clean

¹ Anne Snyder, *Pruitt Allies Explore Hiring Private Lawyers to Rewrite EPA Rule*, *Politico*, Apr. 18, 2017, <http://www.politico.com/story/2017/04/pruitt-water-rules-private-lawyers-237339>.

Water Rule. And, finally, none of the requested records are currently in the public domain. *Id.* at § 2.107(l)(2)(ii). Disclosure of the requested records will thus achieve FOIA's core purpose: keeping the public "informed about 'what their government is up to.'" *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Third, EPA's disclosure of the requested records will "contribute to the understanding of a reasonably broad audience of persons interested in the subject." 40 C.F.R. § 2.107(l)(2)(iii). There is no question that the promulgation of the Clean Water Rule was itself a matter of significant public interest. Indeed, EPA received over one million comments on the proposed rule and held over four hundred meetings across the nation with a variety of interested persons. 80 Fed. Reg. at 37,057 col.1. The Massachusetts Attorney General, who is the chief law officer for the Commonwealth of Massachusetts and its more than six million residents, joined six other states—Connecticut, Hawaii, New York, Oregon, Vermont, Washington—and the District of Columbia to defend the Clean Water Rule in the U.S. Court of Appeals for the Sixth Circuit. At a minimum, we intend to share the disclosed records with this group, something that will be of "great benefit to the public at large" as we continue to advocate for strong federal protection for our nation's waters. *See Carney v. Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). In addition, our Office engages regularly with the public and serves as a source of information to promote the public's understanding through speaking engagements, press releases, and other social media.² Those public outreach actions, coupled with our expertise in both administrative and environmental law, make our Office well suited to disseminate more broadly, which we also plan to do, any notable records disclosed as part of this request.

Fourth, EPA's disclosure of the requested records "is likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv). A basic concept under the APA is that agencies such as EPA, which are authorized to promulgate regulations to implement the details of the programs they have been tasked with administering, will themselves carry out that quintessential government function. *See, e.g.*, 5 U.S.C. § 553. The possibility that the EPA Administrator may outsource some or all of his rulemaking authority under the Clean Water Act to non-federal government persons or entities challenges that basic concept. And, as far as we are aware, it would be unprecedented. For that reason, the disclosure of the requested records that relate in any respect to that issue would certainly contribute "significantly" to the public's understanding of EPA's authority to use non-federal government persons or parties to reconsider, rescind, or rewrite the Clean Water Rule. And, in light of the fact that there is

² Massachusetts Attorney General Maura Healey, News and Updates—Press Releases, <http://www.mass.gov/ago/news-and-updates/>; Massachusetts Attorney General Maura Healey, Twitter—@MassAGO, <https://twitter.com/MassAGO>.

virtually no public information on this topic other than the *Politico* story and a *Greenwire* story published a day later,³ EPA's disclosure of the requested records will undoubtedly enhance the public's existing understanding of this issue to a significant extent, which, again, is next to nothing at this point.

* * *

We appreciate your assistance with this request. Please do not hesitate to contact the undersigned by telephone ((617) 963-2436) or by e-mail (seth.schofield@state.ma.us) if you have any questions about this request.

Sincerely,



SETH SCHOFIELD
Assistant Attorney General
Environmental Protection Division
Senior Appellate Counsel
Energy and Environment Bureau

³ Ariel Wittenberg, *EPA Says It Won't Hire Contractor to Rewrite Regulation*, *Greenwire*, Apr. 19, 2017, <https://www.eenews.net/greenwire/stories/1060053292>.